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291467—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 668

MANUFACTURERS TRUST COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 17–20) is reported in 32 F. Supp. 289.

JURISDICTION

The judgment of the Court of Claims was entered April 1, 1940 (R. 21). On May 28, 1940, the petitioner filed a motion for a new trial which was overruled on October 7, 1940 (R. 21). The petition for a writ of certiorari was filed January 3, 1941 (R. 21). The jurisdiction of this Court is

invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the silver tax should be computed upon individual profitable sales without regard to other unprofitable sales and whether, if so construed and applied, it is a constitutional levy either as a special income tax or a valid excise.

2. Whether a deduction for legal expenses was properly disallowed.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix (*infra,* pp. 8–10).

STATEMENT

The special findings of fact of the Court of Claims (R. 9–16) may be summarized as follows:

Petitioner, a banking corporation, in order to minimize or recoup its losses on certain German investments, sold the investments and used the proceeds to purchase approximately two million ounces of silver in London. This silver was purchased between September 6, 1934, and October 5, 1934, at a cost of approximately $1,000,000 in eight separate purchases at varying prices (R. 9–10).

About December 3, 1935, the Silver Committee of petitioner decided to sell all of the silver bullion due to the declining price trend of silver and on *or* about that date it instructed the vice-presi-

dent to sell all of the silver bullion owned by petitioner and to carry out the selling during the two weeks' period following that date (R. 11).

However, in view of the nature of the London market, the vice-president concluded that it was better to sell the silver in lots over a longer period of time. Accordingly, between December 3, 1935, and January 6, 1936, petitioner's vice-president gave a number of orders to its London correspondent to sell certain amounts of the silver, the orders being carried out according to his instructions as far as possible. The silver was sold in 13 different transactions at varying prices. The sales made from December 3, 1935, to and including December 17, 1935 (no sales being made between December 17, 1935, and January 3, 1936) were made at prices above average cost, while the sales made on January 3 and 6, 1936, were made at prices below average cost (R. 12–13).

The petitioner incurred expenses of $6,287.61 in connection with the holding, processing or transporting of its interest in silver bullion. In addition to these expenses, petitioner paid legal fees amounting to $2,095.10 to counsel who were retained for the purpose of advising in connection with the proposed purchase of the silver and the legal problems involved therein (R. 14).

The total receipts from the sale and disposal of the silver bullion were $1,142,853.27. The cost,

exclusive of the expenses enumerated above, was $1,009,410.31. The gross profit therefrom was $133,442.96, and the net profit, after deduction of expenses enumerated above, including the legal fee, was $125,060.25 (R. 15).

The Commissioner of Internal Revenue ruled that each of the sales of silver bullion which resulted in an excess of receipts therefrom over average cost (including all expenses) was subject to the tax imposed by the Silver Purchase Act. As a result, petitioner filed returns, or memoranda, for each sale. Upon these returns, taxes aggregating $74,969.66 were paid by the affixation of silver-tax stamps involuntarily and under protest (R. 15).

A claim for refund was duly filed by petitioner and rejected by the Commissioner of Internal Revenue. Later, upon the suggestion of the Collector of Internal Revenue for the Second District of New York, petitioner paid additional taxes due to the disallowance of the legal fee as an expense. Claim for refund for this additional tax was also filed and rejected (R. 16).

Upon the foregoing facts, the Court of Claims found that the petitioner was not entitled to recover and dismissed the petition (R. 16).

ARGUMENT

There are no conflicts, and the decision below is plainly correct. The sweeping constitutional and statutory issues raised by petitioner are insub-

stantial, and do not call for further judicial consideration.

1. Petitioner contends first that the silver tax is not an income tax within the Sixteenth Amendment, since losses on some sales are not deductible from gains on other sales. But this Court has already ruled in *United States* v. *Hudson,* 299 U. S. 498 that the silver tax is a "special income tax" (p. 500), and the broad power of Congress to grant, limit, or withhold deductions is well established. Cf. *Helvering* v. *Ind. Life Ins. Co.,* 292 U. S. 371, 381; *White* v. *United States,* 305 U. S. 281, 292.

Even apart from the Sixteenth Amendment, the silver tax is a valid excise. A tax with respect to profit upon sale of personal property has always been considered an indirect tax. Compare *Willcuts* v. *Bunn,* 282 U. S. 216, where the Court sustained a Federal tax upon profit derived from the sale of municipal bonds, and described the tax as (p. 228) "an excise upon the result of the combination of several factors, including capital investment and, quite generally, some measure of sagacity." See also *United States* v. *Stewart,* No. 13, present Term. Moreover, since the tax is imposed on the *transfer* of any interest in silver, its validity as an excise is beyond question. *Bromley* v. *McCaughn,* 280 U. S. 124; *New York Trust Co.* v. *Eisner,* 256 U. S. 345; *Knowlton* v. *Moore,* 178 U. S. 41.

2. Petitioner's contentions with respect to the interpretation of the statute are equally without

substance. Petitioner stresses the word "interest" and argues that only one "interest" in silver bullion was transferred, namely, the entire holding of over 2,000,000 ounces, and that it should not make any difference that the transfer was accomplished for business reasons through a series of transactions. It is said that petitioner's subjective intent, treating the total amount as a single and undivided interest, should be conclusive. But regardless of such intent, the plain fact is that it sold the silver in small lots, at different times, presumably to different persons, from different storehouses, and at different prices (R. 12, 13). In these circumstances, as the court below held, it is impossible to deny that each sale amounted to a separate transfer of an interest in silver within the exact words of the statute. The language of the act is plain and not susceptible to petitioner's construction.

Finally, it is contended that legal fees should have been deducted. But the statute merely provides for the deduction of "allowed expenses" which are defined as "usual and necessary expenses actually incurred in holding, processing, or transporting the interest in silver bullion * * * (including storage, insurance, and transportation charges but not including interest, taxes, or charges in the nature of overhead) * * *." It is to be noted that allowable expenses must be "incurred in holding, processing, or transporting";

and, as the court below observed (R. 20) there is nothing in the statute allowing the deduction of legal fees. Furthermore, as such fees are in the nature of overhead which is specifically excluded as an allowable expense, it is submitted that the decision of the court below was correct.

CONCLUSION

There is no conflict of decision and petitioner's principal contentions are foreclosed by decisions of this Court. No sufficient reason appears for granting the writ and it should therefore be denied.

Respectfully submitted.

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FEBRUARY 1941.